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80-1457

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT L. HARDIN - - - - Petitioner

versus

PITNEY-BOWES, INCORPORATED - Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court for the Western District of Kentucky granted a Summary Judgment to the Defendant, Pitney-Bowes, Incorporated, in an Age Discrimination in Employment Act of 1967, 29 U.S.C. # 621 *et seq.* on the grounds that the Plaintiff had not sustained the burden of showing that the discrimination was *prima facie unlawful* (see Appendix). The Plaintiff by pleadings and deposition presented fact disputes concerning defendant's "business reasons" for discharging him. The two questions presented are:

1. Once a Plaintiff has presented a *prima facie* case of discrimination, in accordance with *McDonnell Douglas Corp.* v. *Green,* 93 S. Ct. 1817 (1973); *Furnco Construction Corp.* v. *Waters,* 98 S. Ct. 2943 (1978) and *Board of Trustees of Keene State College* v. *Sweeney,* 99 S. Ct. 295 (1978), can a judge grant a Summary Judgment based on the Defendant's affidavits in contradiction of such *prima facie* case?

2. Once a Plaintiff has placed at issue both the motive and intent of a company and/or its supervisor in a discrimination case, and therefore raises the issue of the Defendant's state of mind, can a judge deny the Plaintiff's right to cross-examine such parties in open court?

The United States Court of Appeals for the Sixth Circuit may have, by a 2 to 1 decision, held yes.

The Petitioner and Chief Judge Edwards of the United States Court of Appeals for the Sixth Circuit, by way of a convincing dissenting opinion, contends the answer is no.

PARTIES BELOW

Statement Required by Supreme Court of United States Rule 21.1(b):

The Appellee in the United States Court of Appeals for the Sixth Circuit was Pitney-Bowes, Incorporated, which was the Defendant in the District Court for the Western District of Kentucky.

This Petitioner, Robert L. Hardin, was the Appellant in the United States Court of Appeals for the Sixth Circuit and was the Plaintiff in the District Court for the Western District of Kentucky.

The Petitioner, Robert L. Hardin, has served Copies of all appellate papers on the Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ROBERT L. HARDIN - - - - *Petitioner*

v.

PITNEY-BOWES, INCORPORATED - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COUPT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Robert L. Hardin, respectfully prays that a writ of certiorari issue to review the final order and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 28, 1980.

OPINION BELOW

The order and opinion of the Court of Appeals, not yet reported, is in the Appendix hereto. The pertinent memorandum and order of the District Court for the Western District of Kentucky also appear in the Appendix.

JURISDICTION

The final order of the Court of Appeals for the Sixth Circuit was dated and entered on November 28,

1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. # 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. #621 et seq.
28 U.S.C. # 1254(1)

STATEMENT OF THE CASE

The Petitioner was discharged by the Respondent on July 19, 1975 after 8½ years of employment as a Salesman. At the time of his discharge he was 53 years of age.

The Petitioner prior to 1975, the year in which he was discharged, had been one of the top salesmen in the Louisville Office of the Respondent and even in March of 1975 received an award as top salesman of the month for the Louisville Office.

The admitted facts showed that for the months of January, February, April, May and June of 1975 the Petitioner's sales were below the quota of $7,200.00 per month sales volume as established by the Respondent through its District Sales Manager. The Petitioner did not object to the sales volume quota, but offered reasons for his failure to meet said quotas. Those reasons were that the Respondent had given poor service on a large sale made by Petitioner in 1974 which was charged back to him in early 1975 and due to a recession, the type of equipment being sold by the Petitioner for the Respondent had been seriously

affected by the economy. In spite of the outside forces affecting the Petitioner's attaining the quota, he did in July of 1975 reach a sales volume which equaled 83% of the quota set by the Respondent. The Petitioner was discharged in July of 1975, 1½ years prior to his vesting in the Respondent's Pension Plan.

By way of the Deposition of the Petitioner and the Defendant's response to interrogatories, the Petitioner established these facts:

1. The Petitioner belonged to the protected class (between the age of 40 to 65);
2. The Petitioner was qualified for the job (he had been one of the Louisville District's top salesmen prior to 1975 and was the top salesman for March of 1975 in the Louisville District);
3. The Petitioner was terminated;
4. The Respondent sought younger people for the job (the percentage of the work force over 40 years of age dropped from 37% to 25% of the total work force from 1974 to 1975. Additionally 50% of the persons terminated by Respondent in 1974 and 1975 were over 40 years of age); and
5. There is statistical evidence in the record showing a pattern and practice of age discrimination on the part of the Respondent. In response to interrogatories the Respondent showed that from 1971 to 1976 the total percentage of its nationwide sales work force over

40 years of age declined from 47% to 29%. The percentage of new hires over 40 years of age between 1972 to 1976 declined from 19% to 9%.

The District Court for the Western District of Kentucky granted a Summary Judgment to the Respondent and issued a Memorandum Opinion in Support thereof (see Appendix).

The Court of Appeals for the Sixth Circuit affirmed the District Court by a 2 to 1 ruling with Chief Judge Edwards dissenting (see Appendix).

ARGUMENT

1. The Court Below Erred in the Standard Used in Granting a Summary Judgment in an Age Discrimination Case in Direct Conflict With the Holding of the Decisions of This Court.

The court below based its granting of a Summary Judgment on *Moses* v. *Falstaff Brewing Corp.*, 550 F. 2d 1113 (8th Cir., 1977) and *Bishop* v. *Jelleff Associates*, 398 F. Supp. 579 (D.D.C., 1974). Both of these cases are authority for the burden of proof at a trial and are not authority for the granting of a Summary Judgment.

In *McDonnell Douglas Corp.* v. *Green*, 93 S. Ct. 1817 (1973), *Furnco Construction Corp.* v. *Waters*, 98 S. Ct. 2943 (1978) and *Board of Trustees of Keene State College* v. *Sweeney*, 99 S. Ct. 295 (1978), this Court has held that a plaintiff's duty to prove a prima facie case of discrimination can be satisfied by showing:

(1) he belongs to the protected class
(2) he was qualified for the job
(3) he was terminated
(4) Employer seeks younger people for the job.

All the above was proved by the Petitioner. The Respondent's only defense was that there was a "business reason." Based on this the Court below granted a Summary Judgment.

In *Furnco Construction Corporation* v. *Waters,* 98 S. Ct. 295 (1978) this court held that the presentation of a "business reason" for the discharge does not necessarily end the inquiry into employment discrimination but, rather, a plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. The Petitioner did not get this opportunity in the case at bar and was denied his right to present evidence as to the pretext of the Respondent's "business purpose" for his discharge.

This Court has recently questioned the appropriateness of deciding defamation cases on summary judgment where the defendant's state of mind is called into question under the "actual malice" standard. *Hutchison* v. *Proxmire,* 443 U. S. 111, 120 n. 9 (1979); *Wolston* v. *Reader's Digest Association, Inc.,* 443 U. S. 157, 161 n. 3 (1979).

The Respondent's state of mind was in issue before the District Court. The granting of a summary judgment before the Petitioner presented any evidence on the Respondent's state of mind was clearly in error.

2. The Decision Below Is in Conflict With the Age Discrimination in Employment Act of 1967.

The Age Discrimination in Employment Act of 1967 did not establish a lawful and unlawful age discrimination. All discrimination is unlawful under the act.

The Court below in its Memorandum (see Appendix) misunderstood or refused to apply the correct standard when it wrote:

> "Conceding arguendo that *age discrimination was present,* Plaintiff has not sustained the burden of showing that the discrimination was prima facie unlawful."

The Court was stating that there can be lawful age discrimination. This is simply not the law.

3. The Decision of the United States Court of Appeals for the Sixth Circuit Is in Conflict With the Decisions of Other Courts of Appeals as Well as Its Own Decisions.

Chief Judge Edwards of the United States Court of Appeals for the Sixth Circuit in his dissenting opinion (see Appendix) ably recited Chief Judge Colman of the Fifth Circuit in *Hayden* v. *First National Bank of Mt Pleasant, Tex.,* 595 F. 2d 994, 997 (5th Cir. 1979):

> "When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party, granting a summary judgment is especially ques-

> tionable. In these cases 'summary judgment should be used cautiously and all procedural requirements given strict adherence. . . .' Lavin v. Illinois High School Association, 7 Cir. 1975, 527 F. 2d 58, 61 '[O]rdinarily summary disposition of Title VII cases is not favored, especially on a "potentially inadequate factual presentation."' Logan v. General Fireproofing Co., 4 Cir. 1971, 521 F. 2d 881, 883, quoting William v. Howard Johnson's Inc. of Washington, 4 Cir. 1963, 323 F. 2d 102, 105."

The case at Bar falls squarely within this line of cases.

It is of particular importance that the Sixth Circuit in its prior holdings in *S. J. Groves & Sons Company* v. *Ohio Turnpike Commission,* 315 F. 2d 235, 237 (6th Cir. 1963), as set out by Chief Judge Edwards in his dissenting opinion, has held.

> "This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a case of any complexity on a motion for summary judgment, that while such a judgment wisely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one. Knapp v. Kensey, 249 F. 2d 797 801-803, C.A. 6th; Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F. 2d 425,

427 C.A. 6th; Begnaud v. White, 170 F. 2d 323, 327 C. A. 6th; Estepp v. Norfolk & W. Ry. Co., 192 F. 2d 889, C.A. 6th; Bellak v. United Home Life Ins. Co., 211 F. 2d 280, 283, C.A. 6th; Hay v. Progress Pattern Co., 217 F. 2d 701, 704, C.A. 6th; See Sartor v. Arkansas Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967; White Motor Co. v. United States, 83 S. Ct. 696."

The 6th Circuit has failed to apply its own precedence to the case at bar.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the final order and opinion of the Sixth Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

FORE THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 76-0435-L(B)

ROBERT L. HARDIN - - - - - - - *Plaintiff*

v.

PITNEY-BOWES, INCORPORATED - - - *Defendant*

ORDER—Entered October 18, 1978

For the reasons set out in the Memorandum filed this date,

IT IS ORDERED that the motion of the defendant, Pitney-Bowes, Incorporated, for summary judgment be and it hereby is granted, and this action is dismissed with prejudice at the cost of the plaintiff.

There is no just reason for delay, and this is a final and appealable Order.

This 18th day of October, 1978.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

UNITED STATES DISTRICT COURT

FORE THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 76-0435-L(B)

ROBERT L. HARDIN - - - - - - - *Plaintiff*

v.

PITNEY-BOWES, INCORPORATED - - - *Defendant*

MEMORANDUM—Entered October 18, 1978

This action was brought by plaintiff against his employer alleging that he was discriminatorily discharged because of his age in violation of 29 U.S.C. Section 623. He was 53 at the time of his discharge. Defendant employer has moved for summary judgment.

Plaintiff had been employed by defendant for about 8½ years prior to his termination. In April, 1975, a new branch manager, Monte Moon, took over defendant's office in Louisville. Apparently on his first day in Louisville, Moon met with plaintiff to discuss what Moon thought was plaintiff's unsatisfactory sales performance. Plaintiff acknowledges that defendant had set up a monthly sales quota of $7200.00 for its salesmen, and he further admits that he was "comfortable" with that figure.

In his deposition, plaintiff conceded that his sales figures were about $14,000.00 below his quota in the first quarter of 1975. As a result of this drop, plaintiff's draw was cut, probably in February. He testified to "a friendly discussion" with Moon's predecessor, at which the $7200.00

monthly quota was probably discussed, but no definitive action was taken.

On April 15, 1975, an Employee Problem Discussion was held. At the conference were Moon, Harry Brown, the Regional Manager, Bob Widman, Brown's assistant, and plaintiff. Plaintiff testified that there was discussion of his unsatisfactory sales performance and that he "was being put on notice" (Deposition of Plaintiff p. 24). He interpreted this to mean that if a review of his performance every 30 days showed that he was not meeting his quota, he would be terminated. A memorandum of the substance of the discussion was prepared and signed by all parties present. The memorandum concluded with the sentence, "If Mr. Hardin does not meet the above requirements, termination will result" (Exhibit to Deposition).

On June 12, 1975, plaintiff was notified that his production during the two months following the Employee Problem Discussion had been only $6,000.00. He was warned that if he did not meet the $7200.00 quota by July 14, he would be terminated. When he failed to make the quota by July 14, he was asked to resign. Upon his refusal to resign, he was discharged (Deposition of Plaintiff, p. 40 et seq.).

Plaintiff acknowledged in his deposition that his monthly draw, which had been cut from $1,000 to $500, still exceeded his commissions from February, 1975, until his discharge (Deposition, p. 42).

In order for plaintiff to prevail in an age discrimination case, the burden is on him to make a prima facie case of unlawful discrimination. *Moses* v. *Falstaff Brewing Corp.*, 550 F. 2d 1113 (8th Cir. 1977). In the case at bar, conceding arguendo that age discrimination was present, plaintiff has not sustained the burden of showing that the discrimination was prima facie unlawful. The ADEA provides that it is not unlawful to discharge an individual for good cause. 29 U.S.C. Section 623(f)(3). A decision to discharge which

was based on a rational business decision does not constitute a violation of the Act. *Bishop* v. *Jelleff Associates*, 398 F. Supp. 579 (D.D.C. 1974).

A reading of the plaintiff's deposition, coupled with an examination of the entire record, compels the conclusion that plaintiff's discharge was for failure to perform his duties in a satisfactory manner and was not the result of age discrimination by the defendant. Accordingly, defendant's motion for summary judgment will be granted.

An appropriate Order has been entered this 18th day of October, 1978.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-3679

ROBERT L. HARDIN, - - - *Plaintiff-Appellant*

v.

PITNEY-BOWES, INCORPORATED, - *Defendant-Appellee*

ORDER—Filed November 28, 1980

Before: EDWARDS, Chief Judge; KEITH and BROWN, Circuit Judges.

This action was brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* Appellant Hardin alleged that at the age of 53 he was unlawfully discharged from his job as a salesman with appellee Pitney-Bowes due to his age. The district court granted Pitney-Bowes' motion for summary judgment.

Hardin contended before this court that the district court should not have granted Pitney-Bowes' motion for summary judgment because there was a genuine factual issue. Hardin further contends that he was denied discovery.

Pitney-Bowes showed through deposition and affidavit that, without dispute, Hardin had agreed to make minimum sales of $7200 per month and that Hardin, who was on commission basis only, agreed that such was a reasonable quota standard; that Hardin had failed, except for one month, to meet this quota over a six month period and was warned three times that he would be released if he did not

meet it; that of the nine salesmen who were released or quit at around this time, only two, including Hardin, were in the protected class (over forty years of age); that of the six salesmen who were called on the carpet at this time for failure to make quota, only two, including Hardin, were in the protected class; and that of the four who were released for failure to make quota at the same time Hardin was released, only two, including Hardin, were in the protected class.

On this undisputed record we cannot say that the district judge committed error in granting summary judgment to Pitney-Bowes.

Hardin's argument that he should have been allowed to depose Monte Moon, formerly the Pitney-Bowes manager in Louisville who had been transferred to Illinois, in Louisville at Pitney-Bowes' expense is also without merit. Ordinarily, if a plaintiff wishes to depose an employee of a defendant, the plaintiff may not insist that the defendant produce the employee in a city which is not the residence of the employee at the defendant's expense. The plaintiff must go to the witness or pay to bring the witness to the plaintiff. Since Hardin was not willing to do either of these things he cannot properly complain that he was denied discovery.

The decision of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

Issued as Mandate: February 13, 1981

Costs: None

Re: 78-3679

Robert L. Hardin v. *Pitney-Bowes*

EDWARDS, Chief Judge, dissenting. On review of this purely paper record it appears to me that plaintiff, by pleading and deposition, presented fact disputes concerning defendant's "business reasons" for discharging him, which disputes cannot properly be resolved in this age discrimination case without an evidentiary hearing.

Appellant claims that the reason he failed to make his quota in the crucial months at issue was the then existing recession and that the newly hired young sales manager discharged him either because of his age or because he was within 18 months of the vesting of his pension rights with Pitney-Bowes. Thus, I feel that this record has placed at issue both the motive and intent of the company and of the supervisor who was directly responsible for the discharge. As Chief Judge Coleman of the Fifth Circuit recently put the matter:

> When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party,[1] granting of summary judgment is especially questionable. In these cases "summary judgment should be used cautiously and all procedural requirements given strict adherence . . ." *Lavin* v. *Illinois High School Association,* 7 Cir. 1975, 527 F. 2d 58, 61. "[O]rdinarily summary disposition of Title VII cases is not favored, especially on a 'potentially inadequate factual presentation'." *Logan* v. *General Fireproofing Co.,* 4 Cir. 1971, 521 F. 2d 881, 883, quoting *Williams* v. *Howard Johnson's Inc. of Washington,* 4 Cir. 1963, 323 F. 2d 102, 105.

Hayden v. *First National Bank of Mt. Pleasant, Tex.*, 595 F. 2d 994, 997 (5th Cir. 1979).

This court, of course, has a strong tradition of insistence on the right of trial in any case which raises a fact dispute. Judge Shackelford Miller phrased the Sixth Circuit standard as follows:

> This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a case of any complexity on a motion for summary judgment, that while such a judgment wisely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one. Knapp v. Kinsey, 249 F. 2d 797, 801-803, C.A. 6th; Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F. 2d 425, 427, C.A. 6th; Begnaud v. White, 170 F. 2d 323, 327, C.A. 6th; Estepp v. Norfolk & W. Ry. Co., 192 F. 2d 889, C.A. 6th; Bellak v. United Home Life Ins. Co., 211 F. 2d 280, 283, C.A. 6th; Hoy v. Progress Pattern Co., 217 F. 2d 701, 704, C.A. 6th. See: Sartor v. Arkansas Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967; White Motor Co. v. United States, 83 S. Ct. 696.

S. J. Groves & Sons Company v. *Ohio Turnpike Commission*, 315 F. 2d 235, 237 (6th Cir. 1963).

It is particularly inappropriate for summary judgment to be employed where discriminatory motive and intent is the specific claim, countered by the assertion of neutral business reasons. What is at issue in such a case is the

defendant's state of mind.[1] Under such circumstances, the key parties to the dispute ought to be subject to cross examination in open court. The Supreme Court has frequently reminded us of this as shown in the following quotation from an antitrust case:

> It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that "it is quite clear what the truth is." Certainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Poller v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 472-73 (1962).

In my view, summary judgment should be vacated and the case should be remanded for trial.

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[1]The Supreme Court has recently questioned the appropriateness of deciding defamation cases on summary judgment where the defendant's state of mind is called into question under the "actual malice" standard. *Hutchison* v. *Proxmire*, 443 U. S. 111, 120 n. 9 (1979); *Wolston* v. *Reader's Digest Association, Inc.*, 443 U. S. 157, 161 n. 3 (1979).

No. 80-1457

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OCTOBER TERM, 1980

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Petitioner

v.

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

The sole question presented by this case is whether the record in this individual, non-class, age discrimination action reveals any genuine issue of material fact which precludes the District Court from granting summary judgment for the employer.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Pitney-Bowes Incorporated, opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 28, 1980.

COUNTERSTATEMENT OF THE CASE

The Petitioner is a former salesman for Pitney-Bowes whose employment was terminated due to insufficient sales volume. The record demonstrates that all Pitney-Bowes salesmen, regardless of age, were required to meet a monthly sales quota of $7,200. On deposition Petitioner admitted that the monthly quota was "very acceptable," that he was warned on at least three occasions that his failure to meet the quota would result in his discharge, and that he nevertheless continued to

produce sales substantially beneath the minimum quota. After failing for several consecutive months to meet the monthly sales standard for the Louisville branch office, Petitioner was discharged.

The Petitioner then filed a complaint with the Kentucky Commission on Human Rights alleging that he was terminated from his employment with Pitney-Bowes because of his age. He also notified the Secretary of Labor pursuant to Section 626(d) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621, *et seq.* (the "Act"). The Kentucky Commission on Human Rights found ". . . .no probable cause to substantiate the complainant's allegations of discrimination. . . .", and the Secretary of Labor issued notice, pursuant to Section 626(d) of the Act, allowing the Petitioner to pursue his claim individually, which he did.

After extensive discovery by both parties, Pitney-Bowes moved for summary judgment. The deposition of Petitioner proved he had regularly failed to meet his sales quota. The affidavits filed with the motion proved that a number of employees under the age of 40 had also been discharged for failing to meet the same sales quota. In fact, the record demonstrated that only two of nine Pitney-Bowes employees discharged from the Louisville office during the relevant time period were over the age of 40. Most significantly, Petitioner never alleged that the sales quota was a pretext utilized to discharge him and not a bona fide employment policy applied equally to other salesmen. All he ever argued was that his failure to meet the sales quota was explainable by the unproductivity of the sales territory to which he was assigned and the general state of the economy.

On this record, the District Court correctly determined that there was no genuine issue of material fact. The District Judge said:

> A reading of the plaintiff's deposition, coupled with an examination of the entire record, compels the conclusion that plaintiff's discharge was for failure to perform his duties in a satisfactory manner and was not the result of age discrimination by the defendant.

See, Petition for a Writ of Certiorari, p. 12. The United States Court of Appeals for the Sixth Circuit affirmed. After recounting the evidence described above, the Court of Appeals said:

> On this undisputed record we cannot say that the district judge committed error in granting summary judgment to Pitney-Bowes.

See, Petition for a Writ of Certorari, p. 14. This Petition followed.

SUMMARY OF ARGUMENT

The courts below correctly applied the standards erected by this Court allocating the burden of proof in employment discrimination cases, and correctly applied the requirements of Rule 56(e) for granting summary judgment. There are, therefore, no special or important reasons for granting the petition in this case.

ARGUMENT

The record in this individual, nonclass, age discrimination case reveals absolutely no genuine issue of material fact to be adjudicated at trial, much less an issue meriting review by this Court. Both the District Court and the Court of Appeals for the Sixth Circit employed the proper procedures and adhered to prevailing law in granting and affirming the summary judgment. That result presents no special or important issue, nor does it create any conflict among the circuits.

As grounds for granting his petition, the Petitioner asserts that the courts below departed from the standards established by this Court for allocating the burden of proof in employment discrimination cases and departed from the standards for granting summary judgment. However, the summary judgment entered by the District Court and affirmed by the Sixth Circuit was squarely based upon the allocation of proof required by this Court for individual employment discrimination cases

alleging disparate treatment. *See, McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Furnco Construction Co. v. Waters,* 438 U.S. 567 (1978); *Board of Trustees of State College v. Sweeney,* 439 U.S. 24 (1978). Even assuming arguendo that the Petitioner established a prima facie case of discrimination based on age, Pitney-Bowes presented evidence which amply rebutted that prima facie case and Petitioner failed to offer any evidence that the business reason articulated by Pitney-Bowes for his termination was actually a pretext.

As this Court recently held in *Texas Department of Community Affairs v. Burdine,* 49 U.S.L.W. 4214 (March 4, 1981):

> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff [citations omitted]. The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.
>
> . . .
>
> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons.

While Pitney-Bowes was required only to "articulate some legitimate, nondiscriminatory reason for the employee's rejection," *McDonnell, supra* at 802, rather than to "persuade the court that it was actually motivated by the proffered reasons," *Burdine, supra* at 4215, Pitney-Bowes provided ample evidence that the Petitioner was terminated for substandard job performance. At no time has the Petitioner denied the accuracy of the evidence submitted in this regard by Pitney-Bowes. Instead, he

has admitted his failure to meet his sales quota and blamed that failure on the economy.

Nor is it persuasive for Petitioner to argue that summary judgment was an inappropriate remedy on the facts of this case. The Petitioner's duties in response to Pitney-Bowes' motion for summary judgment are expressly set forth in Fed.R.Civ.P. 56(e), which provides, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of his pleading,* but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial (emphasis added).

The Petitioner in the present case has made no attempt to comply with this requirement of Rule 56. Rather, he seems to argue that he becomes entitled to a full trial merely by establishing a prima facie case and that Rule 56(e) has no application in employment discrimination cases. He is wrong in both assertions.

This Court has held that Rule 56(e) means precisely what it says. In *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 289-90 (1968), an antitrust case, this Court refused to accept the argument now propounded by the Petitioner, stating:

> Essentially all that the lower courts held in this case was that Rule 56(e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding is correct. *To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled*

> *with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it.* While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint (emphasis added).

The lower federal courts have properly applied the *Cities Service Co.* holding to grant motions for summary judgment in employment discrimination cases. In *Anderson v. Viking Pump Division, Houdaille Industries, Inc.*, 545 F.2d 1127, 1129, (8th Cir. 1976), a case in which the plaintiff alleged a violation of the Age Discrimination in Employment Act, the court stated:

> [The employer's] unrefuted affidavits showed that Anderson was not rehired because of his previous below-average performance on the job and that his position was left unfilled for a substantial period of time. Thus, the facts pertaining to the termination of Anderson's employment at Viking were not in dispute. They established that Viking based its decision not to rehire on Anderson's previously poor performance, which constitutes "good cause" under the ADEA, 29 U.S.C. §623(f)(3). Anderson failed to set forth specific facts showing that there was a genuine issue for trial, *Brennan v. Reynolds & Co.*, 367 F.Supp. 440 (N.D. Ill. 1973), and the District Court's grant of Viking's motion for summary judgment was proper. FED.R.CIV.P. 56; see, *Cervantes v. Time, Inc.* 464 F.2d 986 (8th Cir. 1972). *While summary judgment is an extreme remedy and is to be granted only where the facts clearly demonstrate no genuine issue to be tried, the adverse party may not rest upon his pleadings but must set forth specific facts showing a genuine issue for trial* (emphasis added).

See also, Fleischhaker v. Adams, 481 F.Supp. 285 (D.C.D.C. 1979); *Stovall v. City of St. Louis Board of Education,* 469 F.Supp. 551 (E.D. Mo. 1979), *aff'd,* 614 F.2d 619 (8th Cir. 1980); and *Minor v. Lakeview Hospital,* 434 F.Supp. 633 (E.D. Wisc. 1977), *aff'd,* 582 F.2d 1284 (7th Cir. 1978), wherein the court expressly applied *Cities Service Co.* in an employment discrimination suit, stating:

> While, generally, an issue regarding the motivation of a defendant is not susceptible to a motion for summary judgment, such issues may be examined upon a summary judgment motion to determine if the plaintiff is able to present some affirmative evidence regarding the discriminatory motivation of the defendant. The Supreme Court has recognized this utilization of Rule 56 in antitrust cases.

The courts below found that the Petitioner had not set forth any specific facts indicating Pitney-Bowes' sales quota was a pretext for age discimination, and that disposition of the instant case by summary judgment was therefore appropriate under the criteria established by this Court and Rule 56(e). That holding need not be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-1457

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT L. HARDIN - - - - Petitioner

versus

PITNEY-BOWES, INCORPORATED - Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1457

ROBERT L. HARDIN - - - - *Petitioner*

v.

PITNEY-BOWES, INCORPORATED - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

The Petitioner wishes to reply to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari as follows:

COUNTERSTATEMENT TO RESPONDENT'S STATEMENT OF THE CASE

The Respondent misstated that only two of nine Pitney-Bowes employees discharged from the Louisville office during the relevant time period were over the age of 40.

In their Motion for Summary Judgment before the District Court, the Respondent stated that five (all under 40) of the nine referred to in their Brief in Opposition, "quit" and none of these five were involved in the "low sale volume problem", they having quit for

personal reasons. Therefore, the relevant ratio for this court's consideration is the two of four persons terminated for low sales volume who were over 40 years of age.

This becomes important to the Petitioner's position in light of the statistics set out in his Counterstatement to the Respondent's Argument hereinafter.

In addition to the two persons over 40 years of age who were terminated for low sale volume, one Mr. Bethel Murray, who was 58 years of age, was placed on leave of absence for alleged low sales volume.

The Petitioner also showed the District Court by way of his deposition that three persons under 40, who had low sales volume, they being, Jerry Horine, Ron Perigo and Danny Horine, were not terminated as a result thereof, but were given ample time to improve their performance.

In summary, the Louisville office for the Respondent was reduced by five people for alleged "low sale volume", three of which were over 40 years of age and two of which were under 40 years of age, and three people under 40 years of age were retained in spite of their low sales volume.

COUNTERSTATEMENT TO RESPONDENT'S ARGUMENT

Contrary to the statements made by the Respondent in their brief in Opposition to the Petition for Writ of Certiorari, the Petitioner did offer evidence that the business reason articulated by the Respond-

ent, Pitney-Bowes, for the termination was actually a pretext.

The Petitioner responded to the Motion for Summary Judgment by presenting to the District Court a summation of the Respondent's Answers to Interrogatories, which clearly demonstrated that the Respondent's termination and hiring practices had reduced the Louisville work force from 39% over 40 years of age on December 31, 1971 to 23% over 40 years of age on December 31, 1976 (see Appendix).

The Response to the Motion for Summary Judgment (see Appendix) was in fact an attempt on the part of the Petitioner to comply with the requirements of Rule 56 (Fed. R. Civ. P. 56(e)) in that the Petitioner brought to the attention of the court the statistical information obtained by Petitioner as a result of the interrogatories propounded to the Respondent. The Petitioner did not therefore rest upon the mere allegations or denials of his pleading, but showed by such response that there was a genuine issue of a material fact—which precluded the District Court from granting a summary judgment for the employer.

The Response to the Motion for Summary Judgment (see Appendix) further showed to the District Court that the Respondent's termination and hiring practices were materially affecting the work force of Pitney-Bowes nationwide for persons over 40 years of age by reducing the number of persons over 40 years of age from 47% of the work force in 1971 to 29% in 1976.

The Petitioner has carried forward his burden in accordance with Texas Department of Community Affairs v. Burdine, 49 U.S.L.W. 4214 (March 4, 1981) by showing with statistical evidence that the work force of the Respondent who were over 40 years of age was being materially affected by the termination and hiring practices of the Respondent.

In Bishop v. Jelleff Associates, 398 F. Supp. 579 (D.D.C. 1974) the court held, that where business judgment exceeds permissible limits and reduction in force predominantly of older employees for no apparent rational reason other than age occurs, the spirit of the Age Discrimination in Employment Act (29 U.S.C. §621, *et seq.*) has been violated.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the final order and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

No. C-760435 L(B)

ROBERT L. HARDIN - - - - - - - *Plaintiff*

v.

PITNEY-BOWES INCORPORATED - - - - *Defendant*

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

May it please the Court:

Discrimination in any manner and more particularly, age discrimination, is not normally found in some blatant act of the employers, but, most likely will be found in a systematic approach of eliminating persons protected under the law within some company policy, which has at its alleged purpose, a sound business goal.

Whether such company policy or purpose violates the law as to discrimination must be ascertained by its total effect upon the work force.

STATEMENT OF FACTS

The Plaintiff was not a newly hired salesman. He had been employed by the Defendant for over eight (8) years at the time of his termination. Through 1974 he had apparently performed his tasks in accordance with company policy.

In addition thereto, in March of 1975, he was awarded recognition as being the top salesman in the Louisville Dis-

tract (Hardin deposition, page 53, question 264). Even in spite of being the top salesman in the Louisville District for March of 1975, Mr. Moon had a discussion with the Plaintiff on April 15, 1975 and gave him a warning because of his low cumulative sales volume for 1975 to date, that being the months of January, February and March.

At that time, the Plaintiff discussed with Mr. Moon the reason for the low sales volume in January and February, that being a sizeable chargeback. It was discussed at that time that the chargeback resulted from poor service by Pitney-Bowes Service Department and was not a result of poor sales performance by the Plaintiff (Hardin's deposition, page 55, question 271). In that discussion with Mr. Moon, the Plaintiff related to him that he had exhausted his territory and due to the economics of the country at that time, and more particularly, in the type of equipment being sold by the Plaintiff, that he was in a low sales volume situation. Apparently, Mr. Moon dismissed these explanations by the Plaintiff without justification. Mr. Moon had only recently been assigned to the Louisville Sales Office and was not in a position to so readily dismiss the explanation of an employee, who was both experienced with his territory and his product, without some investigation. (Hardin deposition, pages 56 and 57).

The Plaintiff does not attempt to allege that his sales volume was up to the standard as set by Mr. Moon. His position though is that Mr. Moon and Pitney-Bowes did not take into consideration the fact that the Plaintiff's sales territory had been exhausted for the particular product being sold by the Plaintiff and of the general economic nature of the country at this time. The Plaintiff alleges that Mr. Moon and Pitney-Bowes did in fact use these factors as the excuse for terminating the Plaintiff because he was over 40 years of age. Other employees who did not attain the sales volume goals were retained

and they were under 40 years of age, they being Jerry Horine, Ron Perigo and Danny Horine. (Hardin deposition, page 62).

In order to ascertain whether the effect of Pitney-Bowes' policy to terminate employees because of sales volume quotas was administered in a non-discriminatory manner, it is necessary that one looks to the total work force and the age thereof to ascertain the effect of these terminations. In response to the Interrogatories propounded by the Plaintiff to the Defendant, and more specifically, to Interrogatory 1, the Defendant submits information which is summarized as follows:

Average Age of Employees at Louisville Office and Percent of Work Force Over 40

Year Ending	Avg. Age	% Over 40
12/31/71	37.04	39%
12/31/72	37.54	38%
12/31/73	38.07	37%
12/31/74	37.80	37%
12/31/75	35.95	25%
12/31/76	34.62	23%

As can be seen from the above facts, on December 31, 1971 there was 39% of the work force at the Louisville office who were over 40 years of age. On December 31, 1976 there was 23% of the work force over 40 years of age. It should also be noted that from December 31, 1974 thru December 31, 1975, that the percent of the work force over 40 dropped from 37% to 25%, being the time period involved in the termination of the Plaintiff. In other words, the impact of the company policy to terminate employees because of alleged low sales volume, netted a reduction in the work force of persons over 40 of 12%.

You are particularly directed to the Defendant's Memorandum in support of their Motion for Summary Judgment on page 4 immediately above the paragraph designated as "argument" whereby "of the four (4) who were terminated for low sales volume, two (2) were under 40, two were over 40." Therefore, 50% of the persons terminated for low sales volume were over 40 years of age. The Defendant also fails to include therein one Bethel Murray, who was required to take a leave of absence in August of 1975 and was later transferred to the Birmingham office. Had not Bethel Murray taken leave of absence, it is the Plaintiff's contention that he also would have been terminated from the Louisville District Office. (Hardin deposition, page 62).

The Defendant alleges that the reason for the Plaintiff's termination was low volume of sales. If such were the case, then and in that event, it would be reasonable to anticipate that the replacement of employees at the Louisville District Office would include persons who were over 40 years of age at the same rate as the persons terminated which was 50% as admitted by the Defendant. In response to Interrogatory 4 propounded by the Plaintiff to the Defendant, the Defendant submitted information which is summarized as follows:

Average Age of New-Hires at Louisville Office

Year	Average Age	% Over 40
1972	33.00	0%
1973	26.00	0%
1974	25.00	0%
1975	26.80	0%
1976	29.36	7%

As can be seen by the above facts, there were no new-hires by the company in the Louisville office for the years

1972 thru 1975 who were over 40 years of age. In 1976 apparently there was one employee hired who was 42 years of age, which accounts for the 7% of the new hires during 1976. But, even at that, 7% is far below the 23% of the average age of the work force over 40 at the same time as was shown by the previous schedule hereinabove presented.

Apparently the alarming statistics as hereinabove presented for the Louisville office was in fact not an isolated situation of eliminating employees over 40 while hiring employees under 40 to replace and expand the work force. The same evidence on a Company-wide basis indicates the same results. In response to the Interrogatories propounded by the Plaintiff to the Defendant, a massive amount of facts were presented which are in effect, filed in Court, but, which have been retained by the Defendant in the office of its counsel at this time. The computer runs indicated that there are seven (7) general areas of division of the sales force of Pitney-Bowes. The information given in response to the Interrogatories is summarized as follows by these districts as to the percent of the work force over 40:

Percent of Work Force By Region Over 40

	Central	Eastern	Gr. Lakes	Mid-Western	North Eastern	South	Western	Total
1971	38%	46%	46%	43%	53%	47%	52%	47%
1972	35%	43%	39%	39%	51%	46%	49%	44%
1973	33%	37%	32%	34%	45%	44%	41%	39%
1974	32%	39%	32%	33%	41%	40%	39%	36%
1975	30%	36%	32%	34%	37%	38%	40%	35%
1976	21%	31%	22%	29%	34%	33%	33%	29%

As is shown by their response to the Interrogatories, there appears to be a systematic reduction of the percent of the work force over 40 years of age since 1971 thru 1976.

This may be classified as the "big picture" which would indicate that the Defendant's Manager, Mr. Moon, was in effect, merely carrying out the overall company policy of reducing the number of employees in the work force who are over 40 years of age.

Again, one must look to the method of hiring people to ascertain whether the company, as a whole, was hiring persons over 40 during this period of time. In response to the Plaintiff's Interrogatories, again, the Defendant presented a massive amount of computer printouts concerning this matter and which is summarized as follows:

Percent of New-Hires By Region Over 40

	Central	Eastern	Gr. Lakes	Mid-Western	North Eastern	South	Western	Total
1972	19%	13%	15%	22%	32%	9%	25%	19%
1973	16%	18%	9%	13%	20%	23%	25%	18%
1974	18%	11%	19%	18%	19%	12%	20%	17%
1975	10%	24%	16%	15%	8%	10%	23%	15%
1976	6%	11%	7%	8%	9%	12%	13%	9%

Again, in reviewing the statistics presented by the Defendant, it is clear that the percent of new-hires over 40 shows a continual reduction for the period of 1972 thru 1976.

The effect of these statistics are that on December 31, 1971, 47% of the sales work force was over 40 years of age and on December 31, 1976, the percent of the sales work force over 40 was 29%. The statistics also show that in 1972, of the persons hired by Pitney-Bowes, 19% were over 40 years of age and in 1976 only 9% of its new-hires were over 40 years of age.

ARGUMENT

The record in this case shows that the Plaintiff had worked for the Defendant for a period of 8 years apparently without any problem. That in January of 1975 and February of 1975, the Plaintiff's sales volume was not up to the Defendant's standard. One of the reasons that it was not up to the standard was chargebacks to the Plaintiff's account due to poor service on the part of the Service Department of the Defendant of which this Plaintiff was not a part thereof. In addition to that, the Plaintiff indicated to the Defendant that he had exhausted his territory as to the Defendant's product which was being sold by the Plaintiff, and that the economic conditions of the country at that time were not favorable to the particular product that the Plaintiff was required to sell in his territory. In spite of these factors, the Plaintiff did, in the month of March, 1975, receive the award by the company as the top salesman in the Louisville District. Therefore, after 8 years, the Defendant decided to base the Plaintiff's entire work career with its company on two (2) months' activity, that being January and February of 1975, even though there was an explanation therefor. Again, in spite of receiving the top salesman award in the Louisville District for March of 1975 the Defendant did, in April, warn the Plaintiff as to his cumulative sales volume for 1975. Again, in April and May of 1975 the Plaintiff's sales volume was low based upon the exhaustion of the territory and the economic condition of the country. In June and July of 1975 the Plaintiff's sales volume went up and in fact, approaching the standard of $7,200.00 in July of 1975. In spite of the efforts on the part of the Plaintiff, the Defendant ascertained that the Plaintiff should be terminated, which occurred in July of 1975. Therefore,

an 8½ year career was brought to an end with the Defendant on only the performance of several months' activity.

By their own admission, 50% of the persons terminated for low sales volume were over 40 years of age and it is the Plaintiff's argument that Mr. Murray was, in fact, terminated from the Louisville Office for the same reason, which indicates that of the five (5) terminations for low sales volume, three (3) were over 40 years of age, which represents 60% of the men terminated for low sales volume.

The Plaintiff's position is supported by the statistics as presented by the Defendant in response to the Interrogatories which shows that the Louisville office was systematically reducing the percent of the employees over 40 years of age and did in fact in the period 1975, eliminate 12% of the work force over 40 years of age. The Plaintiff further supports his position in connection with the Louisville office by showing that there were no new-hires over 40 years of age from 1972 thru 1975 and only 7% of the new-hires were over 40 years of age in 1976.

The Plaintiff further supports his position in connection with his termination being due to age by showing to the Court the statistics associated with the entire company which also shows a systematic reduction of the percent of the work force over 40 and a systematic method of hiring persons under 40.

In summary, the record demonstrates very potently that the Defendant did in fact discriminate in its application of standard sales volume per salesman against persons over 40 years of age.

CONCLUSION

The Plaintiff submits that there is a genuine issue of a material fact to be adjudicated in that he is entitled to present the facts, as set out herein, to the Court for it to ascertain whether such facts indicate that the Defendant did, in the application of its standard of performance, discriminate against persons over 40 years of age and particularly did discriminate against this Plaintiff due to his age.

Respectfully submitted,
Riggs, Walton & Morrison

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Response to Defendant's Motion for Summary Judgment and the Order tendered herewith was mailed to Edgar A. Zingman, Sheryl G. Snyder and Thomas H. Meeker, Attorneys at Law at Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky 40202, by depositing same in the U. S. Post Office, postage prepaid on this 14th day of July, 1978.

(s) George E. Riggs, Jr.